IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 221 of 2005
with
CIVIL APPLICATION No 9891 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE R.S.GARG

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

RUKHIBEN WD/O PARBHUBHAI DAYALBHAI PATEL & 3 - Appellant(s)
Versus
HARSHADBHAI JIVANBHAI PATEL & 2 - Defendant(s)

==========

Appearance :
MR PV HATHI for Appellant(s) : 1 - 4.
MR DAKSHESH MEHTA for Respondent(s) : 1 - 3.

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 14/09/2006

ORAL JUDGMENT

1. Heard Mr. P.V. Hathi, learned counsel for the appellants and Mr. Dakshesh Mehta, learned

counsel for the respondents. The appeal is admitted for hearing the parties on the following substantial questions of law.

"[1] Whether on the facts and in the circumstances of the case, the first appellate court, while setting aside the findings recorded by the learned trial court was obliged to reconsider the entire evidence and record its own finding to come to a different conclusion?

[2] Whether on the facts and in the circumstances of the case, the first appellate court was wrong in making out a new case for the plaintiff that as the plaintiff has no other alternative way to approach his field, he would be entitled to injunction though the plaintiff had come to the Court with the case that he had perfected right of easement in accordance with Section 15 of the Indian Easement Act?"

With the consent of the parties, the matter is finally heard.

2. The plaintiffs had come to the court submitting, inter alia, that they are owners of land bearing block nos. 233, 234, 235, 236 and 237 of village Bhula Falia of Navsari taluka. They submitted before the court that they have right of way through the land bearing survey no.166/4 and no. 168/1 which was subsequently consolidated as block no. 238 belonging to the defendants.

3. The defendants appeared in court and contested the suit. It was their submission that the plaintiffs have not perfected any right of easement by way of prescription or in any case, their suit is not maintainable. After recording the evidence and hearing the parties, the learned trial court dismissed the suit holding, inter alia, that the plaintiffs have not perfected their right.

4. The plaintiffs, being aggrieved by the dismissal, filed Regular Civil Appeal, the first appellate court allowed the appeal holding

inter alia, that as the land was recorded as Kharaba and Marg [way] and as on Kharaba land agricultural operations were not permissible, the plaintiffs were entitled to use the land. It also relied upon the revenue entries of 1958-59, wherein it is shown that the land in dispute was used as Marg.

5. Relying upon the provisions of law, the court came to a conclusion that as on Kharaba land, agricultural operations are not permissible and as the land was recorded as Marg, the plaintiffs would be entitled to right of way.

6. In para-12, the first appellate court simply referred to the statement of the defendant, wherein, he stated that if right of way is not given to the plaintiff, he would have no alternative way.

7. Mr. Hathi, learned counsel for the appellants submits that the findings recorded by the trial court were on due appreciation of the evidence

and if the appellate court wanted to set aside the said findings, then, it was required to marshal the evidence, reconsider the evidence in its entirety and only thereafter, the appellate court could set aside the findings recorded by the trial court. He submits that the cursory statement in para-12 of the appellate judgment also goes wrong, because, the plaintiffs did not come to the court with the case that they were seeking easement as of necessity. According to him, the plaintiffs' case was that they had perfected their right by prescription.

8. Mr. Mehta, learned counsel for the respondents, though contested the matter, but however, was unable to show to me any discussion in the first appellate judgment relating to the oral evidence of the parties. He, however, submits that if the defendant has made an admission in favour of the plaintiffs that the plaintiffs have no alternative way, then, the court below was justified in decreeing the suit.

9. It is true that the first appellate court is entitled to upset or anull any finding recorded by the trial court, but it can do so only if it gives reasons for setting aside the finding recorded by the subordinate court. In the present matter, the first appellate court did not care to consider the oral evidence, but simply proceeded on the strength of provisions of Section 48[3] of the Bombay Land Revenue Code less realizing that any entry in the revenue records would not be decisive in case of easement. When the first appellate court was not agreeing with the findings recorded by the learned trial court, then, it was obliged and duty bound to reappreciate the entire evidence to hold that, the trial court committed error in recording a particular finding, thereafter record its own finding and then, decide the appeal. Unfortulately, the appellate court did not do so. However, the observation made by the learned first appellate court in para-12 of its judgment that, the defendant has made an admission, in the opinion of this Court would

not help the plaintiffs, because, the plaintiffs did not come to the court with a pleading that because of the necessity, they have a right and as such, easementary right should be conferred upon them. The plaintiff had come to the court with a specific plea that for a period of more than 20 years, they being dominant heritage, were exercising right of way on the land of the defendants openly against the interest of the defendants. If the plaintiffs cannot prove accrual of right by prescription, then, the court cannot find a new case for them. Both the questions are answered in affirmative.

10. The learned first court went wrong in setting aside the finding recorded by the learned trial court without even discussing the evidence, and also went wrong in holding that the defendant had made an admission in favour of the plaintiffs.

11. As the learned first appellate court, as a final court of fact, has not considered the evidence,

I would remand the case back to the learned first appellate court for its decision in accordance with law.

12. The parties present in the court are hereby directed to appear before the learned first appellate court on 1st November, 2006. The office is directed to send the records to the first appellate court with a copy of this order enabling the learned first appellate court to know as to what it has to do. After the parties appear before the court, the court shall give them a date for hearing the parties. Thereafter, the first appellate court shall decide the matter in accordance with law and the observations made aforesaid.

13. The judgment and decree granted by the learned first appellate court are set aside. The appeal is allowed. No costs. In view of the final disposal of the Second Appeal, no orders on Civil Application No. 9891/05 are required, it stands disposed of.

[R.S. GARG, J.]

pirzada/-